In The

Supreme Court of the United States

KENT SCHOOL DISTRICT, et al.,

Cross-Petitioners,

v.

TRUTH, an unincorporated association, et al.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

If this Court reviews the Ninth Circuit's decision, should it also review the lower court's holding that a plaintiff can seek injunctive relief under 42 U.S.C. § 1983 in the absence of a government policy that causes the alleged harm, a holding in conflict with decisions of this Court and the First, Second, Fourth and Eleventh Circuits?

LIST OF PARTIES

Cross-Petitioner incorporates by reference the List of Parties set forth in Truth's Petition.

CORPORATE DISCLOSURE STATEMENT

The Kent School District is a government entity. Neither the District nor the individual Cross-Petitioners have parent companies or non-wholly owned subsidiaries.

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For all of the reasons that will be set forth in the Brief for the Respondents in Opposition to Petition for Certiorari, the decision of the Ninth Circuit does not warrant review by this Court. However, if this Court were to review the lower court's ruling, then this Court should also review the Ninth Circuit's holding that the existence of a government policy causing the alleged harm is not a necessary condition for injunctive relief under 42 U.S.C. § 1983. The official policy requirement is a threshold determination that precedes consideration of the constitutional issues raised by Truth's Petition. Thus, reversal of the Ninth Circuit's ruling on the government policy issue will obviate the need to reach the constitutional issues. However, it will not prevent review of the Equal Access Act issues.

OPINIONS BELOW

Cross-Petitioner incorporates by reference the statement of the Opinions Below set forth in Truth's Petition.

JURISDICTION

Cross-Petitioner incorporates by reference the jurisdictional statement in Truth's Petition, and adds the following: Cross-Petitioners are relying on the

procedures set forth in SUP. Ct. R. 12.5. The date of docketing of Truth's Petition for Writ of Certiorari is March 12, 2009.

STATUTORY PROVISIONS

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Factual Background

In September 2001 two students at Kentridge High School in the Kent School District, Sarice Undis and Julianne Stewart, submitted a proposal to establish a Christian Bible club named "Truth." Pet. App. 3a-4a. The first proposal called for membership to be open to all students. Pet. App. 4a.

At the time of Truth's first proposal, an appeal to the Ninth Circuit was pending in *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003), a case arising in the Western District of Washington where the Kent School District is located. In *Prince*, the district court had ruled that a Christian Bible club could not be established as an official Associated Student Body ("ASB") organization. 303 F.3d at 1077. On September 9, 2002, the Ninth Circuit issued its opinion in *Prince* reversing the district court ruling.

On February 2, 2003, Truth submitted a new club proposal. The second proposal provided for membership to be open to all students, but restricted voting membership to "members professing belief in the Bible and in Jesus Christ." Pet. App. 5a. On April 1, 2003, the ASB Council voted to deny the application. Pet. App. 6a.

On April 3, 2003, Undis, Stewart and Truth filed this action seeking injunctive and declaratory relief as well as nominal damages. Pet. App. 6a.

On April 9, 2003, Assistant Principal Anderson sent Undis and Stewart a letter informing them of their right to resubmit Truth's application with changes as discussed at the ASB Council meeting. Pet. App. 7a. On April 24, 2003, Stewart and Undis submitted a third club proposal. This proposal restricted general membership by making it "contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible." Pet. App. 117a. The third proposal also required voting members to sign a statement of faith. Pet. App. 7a. On April 25, 2003, the ASB Council voted to deny the application. Pet. App. 8a.

On May 6, the attorney for Truth wrote the School District asking that, if there were a right to appeal a decision of the ASB, his letter serve as a formal request for appeal. Pet. App. 8a. In response, Anderson wrote Undis and Stewart informing them that they could discuss the denial of club status with the High School Principal and, if unsatisfied, with the District Superintendent; or they could alternatively contact the School District's ombudservices office. Pet. App. 118a. Neither Undis nor Stewart ever sought a final decision from any of these officials. Pet. App. 128a.

B. Proceedings Below

1. Cross-Motions for Summary Judgment and District Court Decision

Upon cross-motions for summary judgment, the district court granted summary judgment to Cross-Petitioners on the constitutional and § 1983 claims because of the absence of any acts attributable to the School District's policy-making authority, pursuant to the doctrine established in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Pet. App. 129a. The individual defendants were likewise not liable under § 1983 because they were sued in their official capacity only, which the district court found to be essentially identical to a suit against the government body. Pet. App. 130a. In making this ruling, the district court addressed and rejected three arguments advanced to establish liability under *Monell*. Pet. App. 122a-128a.

First, the district court found that the School District Board of Directors was the sole policy-maker under Washington law and that the District Board had "never decided one way or the other whether the Club should be granted ASB status," thus failing to establish the existence of an "official policy" within the meaning of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Pet. App. 122a. Second, under the analysis set forth in *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), the district court found no evidence that the School Board was deliberately indifferent to the risk of violating

constitutional rights. Pet. App. 124a. Third, using the tests established in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the district court found no evidence that school officials sought to insulate themselves from liability by referring the matter to the ASB. The court specifically found that "the shifting nature of Plaintiffs' proposals warranted repeatedly returning to the beginning of the process, namely the ASB Council's recommendation." Pet. App. 129a. The court further found that, even after the denial by the ASB Council, "Plaintiffs never sought a final decision" from any of the officials identified in the Assistant Principal's May 12, 2003 letter as having authority over the ASB. Pet. App. 128a.

The district court then went on to analyze Truth's Equal Access Act claims. Despite dismissing the § 1983 and constitutional claims, the district court also proceeded to analyze the First Amendment issues in the event its *Monell* ruling was deemed erroneous. Pet. App. 135a.

2. Ninth Circuit Decision

In its initial opinion and each of its subsequent opinions, the Ninth Circuit used identical language to reverse the district court's ruling on the *Monell* issue. Pet. App. 19a-20a, 56a-57a, 91a-92a. In doing so, the court below relied on *Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989), where it had previously held that *Monell's* official policy requirement does not apply where plaintiffs seek only prospective relief.

Pet. App. 19a. The panel then went on to analyze both Truth's Equal Access Act claims and its First Amendment claims.

Chaloux was a class action brought to challenge Idaho garnishment statutes. The plaintiffs there did not directly sue the state, which had created the statutes, but instead sought injunctive relief under § 1983 against county sheriffs whose duty it was to enforce the statutes. *Id.* at 249-50. The district court dismissed the action based on the absence of a *Monell* official policy or custom. *Id.* The Ninth Circuit reversed, holding that *Monell* was crafted to "alleviate the imposition of financial liability on local governments." *Id.* at 250. The *Chaloux* court found that the financial justification it perceived as the basis for *Monell* was "notably absent when the relief sought is an injunction." *Id.* at 251.

The Ninth Circuit panel in *Truth* made no attempt to distinguish *Chaloux* or limit its holding and held that it was bound by the precedent. Pet. App. 19a-20a.

C. Reasons for Granting the Cross-Petition if Truth's Petition Is Granted

1. Resolution of the *Monell* Issue Must Necessarily Precede Consideration of the Constitutional Claims

If this Court holds that the existence of an official policy or custom is a required element of Truth's § 1983 claim, then this Court will not reach the

constitutional issues raised. Instead, this Court's review will focus exclusively on the club's Equal Access Act claim.

2. The Ninth Circuit Holding Conflicts with This Court's Decision in *Monell*

The *Monell* decision answered a question of statutory interpretation, determining whether and when a municipal entity is a "person" subject to suit under § 1983. In rejecting respondeat superior liability and in holding that a government entity is a "person" subject to suit only when the harm in question results from an official policy or custom, this Court made no distinction between suits for damages and suits for injunctive or declaratory relief. To the contrary, all forms of relief were included in the holding of *Monell*.

> . . . Local governing bodies, therefore, can be sued directly under § 1983 for *monetary*, *declaratory*, or *injunctive relief* where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers . . .
>
> On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant

> to official municipal policy of some nature caused a constitutional tort.

Monell, 436 U.S. at 690-91 (emphasis added).

Contrary to the interpretation of the *Chaloux* court, the holding of *Monell* is not simply a judicially-created device to limit the financial liability of local governments. Instead, the required existence of an official policy carries out the intent of Congress that local governments would be "persons" subject to suit under § 1983 only in limited circumstances. *Monell* clearly defines these circumstances, holding that local governments are "persons" under § 1983 only if an official policy or custom has caused the constitutional harm alleged. Nothing in *Monell* or the legislative history of § 1983 indicates that Congress intended the definition of "person" to vary from case to case depending on how much money was at stake for the local government. Thus, whether the plaintiff seeks declaratory relief, injunctive relief, substantial monetary damages, mere nominal damages, or only attorney fees is irrelevant.

Even if potential financial consequences were a relevant factor, the impact of attorneys' fees in § 1983 cases contradicts the reasoning of the *Chaloux* court. In many § 1983 cases, even those seeking monetary damages, the attorneys' fees awards can far outstrip the other financial impacts on local government. The case at bar presents a perfect example. Here, if Truth is allowed to maintain its § 1983 claim and prevails, the Kent School District will be required to pay the

substantial attorneys' fees generated in the district court and the subsequent appellate proceedings.

No District policy is implicated in this case, and no District official ever rendered a final decision on any of the club's applications. Consequently, the District is not a "person" who has caused a deprivation of rights within the meaning of § 1983. Holding otherwise would greatly distort the scope of the statute, a distortion starkly highlighted by the possibility that the District could be liable in this case for failing to approve a club application that was not yet even in existence when the lawsuit was filed. Nothing in the extensive jurisprudence of § 1983 would support such a result.

3. The Ninth Circuit Decision Conflicts with Decisions of at Least Four Other Circuits

The First Circuit has rejected the argument that a claim for prospective injunctive relief could be maintained in the absence of an official policy. *Dirrane v. Brookline Police Dept.*, 315 F.3d 65, 71 (1st Cir. 2002). The *Dirrane* court specifically contradicted *Chaloux*, stating that it was "on its face at odds with *Monell* itself." *Id.*

The Second Circuit also has rejected a claim for injunctive relief in the absence of an official policy and also found the reasoning of *Chaloux* inadequate. *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2nd Cir. 2007).

> To the extent *Chaloux* proposes to exempt all claims for prospective relief from *Monell's* policy or custom requirement, we are not persuaded by its logic. *Monell* draws no distinction between injunctive and other forms of relief and, by its own terms, requires attribution of misconduct to a municipal policy or custom in suits seeking monetary, declaratory, or injunctive relief.

Id. (citations omitted).

In *Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995), while not mentioning *Chaloux* specifically, the Fourth Circuit contradicted the Ninth Circuit ruling. The *Greensboro* court held that the plaintiffs were not entitled to injunctive relief under § 1983 because they could not establish the existence of a municipal policy. *Id.* at 966-67.

In vacating a preliminary injunction granted by the district court, the Eleventh Circuit also applied the municipal policy requirement to requests for injunctive relief under § 1983. *Church v. City of Huntsville*, 30 F.3d 1332, 1347 (11th Cir. 1994).

Two other circuits have indicated a reluctance to follow *Chaloux*. In *Leary v. Daeschner*, 228 F.3d 729 (6th Cir. 2000), the Sixth Circuit acknowledged the split among the circuits and assumed, "without deciding, that the prohibition on respondeat superior liability for municipal officers also applies where the plaintiffs are seeking injunctive relief rather than

damages." *Id.* at 740, n.4 (citations omitted). The Seventh Circuit also commented on the split among the circuits in *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002), noting that "the predominate though not unanimous view is that *Monell's* holding applies regardless of the nature of the relief sought." *Id.* at 468 (citations omitted).

The *Chaloux* decision has received criticism even within the Ninth Circuit. In her concurring opinion in *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469 (9th Cir. 1993), Judge Fletcher acknowledged that *Chaloux's* "holding is in conflict with *Monell*." *Id.* at 1477. Judge Fletcher went on to urge the Ninth Circuit to search for an opportunity to revisit *Chaloux* stating that "where a satisfactory alternative presents itself, we should avoid the further propagation of an unsound legal proposition that is at odds with Supreme Court precedent." *Id.* at 1478.

CONCLUSION

If this Court were to review the constitutional and Equal Access Act issues raised by Truth's petition, it would necessarily, as a threshold matter, need to review the "unsound legal proposition" that underlies the Ninth Circuit's *Monell* ruling. Review of that issue by this Court would avoid "further propagation" of that defective doctrine.

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No. 08-1268

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RESPONSE TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

The Ninth Circuit, in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989), seemingly diverged from other circuits in determining that the official-policy requirement set out in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) does not apply to claims for prospective relief. In the instant case, the Ninth Circuit cited *Chaloux* and held *Monell* inapplicable on that basis. But since Truth actually challenges an official policy, specifically, the nondiscrimination policy relied upon by the school district to deny access to a forum open to other non-curricular clubs, the cross-petition begs the following question: Is this case an appropriate vehicle to resolve the issue over *Monell*'s official-policy requirement?

LIST OF PARTIES

In this conditional cross-petition, Cross-Petitioners are Defendants Kent School District, Barbara Grohe, Superintendent of Kent School District, Mike Albrecht, Principal of Kentridge High School, and Eric Anderson, Vice Principal of Kentridge High School ("District"). Cross-Respondents are Plaintiffs Truth, an unincorporated association, Sarice Undis, and Julianne Stewart ("Truth").

CORPORATE DISCLOSURE STATEMENT

Truth states that it has no parent companies or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

As explained in detail in its petition for a writ of certiorari in *Truth v. Kent School District*, No. 08-1130 (filed Mar. 10, 2009), Truth is a Christian student club that was denied associated student body (ASB) status at Kentridge High School in the Kent School District because Truth's membership criteria require students to possess a true desire to study the Bible and grow in a relationship with Jesus Christ. App. 11a.

Kent School District Policy 3210 addresses "nondiscrimination" and mandates equal treatment in student clubs "without regard to ... creed," among other things. App. 9a, 171a. The term "creed" prohibits selective membership on the basis of religious beliefs. App. 9a. In addition to its own policy, the District relies on Washington State nondiscrimination law, Washington Revised Code § 49.60.215 (West 2006), that likewise precludes religious-oriented choices. App. 10a-11a. According to the District, these nondiscrimination policies require it to deny ASB recognition to Truth. App. 11a.

Truth brought suit under the Equal Access Act, 20 U.S.C. §§ 4071-4074, and the First and Fourteenth Amendments. The district court granted District's motion for summary judgment on Truth's constitutional claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and on standing and ripeness grounds. App. 121a-130a. The court also ruled against the club on its Equal Access Act

claim, finding that Truth was not covered by the Act's protection. App. 130a-135a. And, in an alternative holding, the district court deduced that Truth could not prevail on its expressive association claim. App. 135a-147a.

The Ninth Circuit panel affirmed the outcome, but on different grounds. It first dismissed the District's arguments on standing and ripeness, finding that Truth's denial of charter club status is an injury-in-fact that is directly traceable to the District's nondiscrimination policy. App. 86a-91a. The panel then reversed the district court's *Monell* ruling, citing *Chaloux v. Killen*, 886 F.2d 247 (9th Cir. 1989) and holding *Monell* inapplicable to claims for prospective relief. App. 91a-92a.

The panel went on to scrutinize the District's nondiscrimination policy under both the Equal Access Act and the First Amendment. Recognizing the District's reliance on the nondiscrimination policy as basis for excluding Truth, the Ninth Circuit upheld the policy under the Act as a facially content-neutral measure. App. 93a-100a. And despite pegging strict scrutiny as the appropriate standard, the panel rejected Truth's expressive association claim because it could not perceive a "First Amendment interest." App. 100a-107a.

Truth filed a petition for rehearing and rehearing en banc. The Ninth Circuit responded by withdrawing its opinion and issuing a substituted one. App. 39a-73a. The panel's analysis on the Equal Access Act remained substantially the same, but not so for Truth's expressive association claim.

The panel jettisoned this Court's expressive association jurisprudence and applied public forum analysis instead, upholding the District's nondiscrimination policy as a reasonable, viewpoint-neutral restriction in a limited public forum. App. 67a-71a.

Truth filed a second petition for rehearing en banc. Subsequently, the panel amended their second opinion to add a two-judge concurring opinion, which expounded on the thinking of these two judges in applying forum analysis to Truth's expressive association claim. App. 35a-38a. The Ninth Circuit eventually denied Truth's en banc petition, over the dissent of Judges Bea and O'Scannlain. App. 148a-164a.

Truth timely filed its petition for writ of certiorari, asking this Court to review the Ninth Circuit's adverse holdings on Equal Access Act and expressive association claims. The District has now filed a conditional cross-petition concerning the Ninth Circuit's treatment of *Monell*.

ARGUMENT

There appears to be a disagreement among the circuits about the application of *Monell* - and the requirement of an official policy for municipal liability – in respect to claims for prospective relief. But the present case does not turn on this issue. The harm suffered by Truth arose from the District's nondiscrimination policy, an official policy of the District. Thus, this Court need not resolve the

possible circuit split over *Monell* to reach the constitutional issues raised in Truth's petition.

Monell held that a local government is among those persons to whom 42 U.S.C. § 1983 applies, but only to the extent that the unconstitutional conduct implements or executes an official policy or custom. 436 U.S. at 690-91. As a result, vicarious liability does not attach under § 1983. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Local governments can only be held responsible for their employees' unconstitutional conduct when there is a "direct causal link" between an official policy and the challenged conduct. *Id.*

Subsequent to this Court's holding in *Monell*, the Ninth Circuit in *Chaloux* opined that this requirement does not apply to claims for prospective relief. 886 F.2d at 250-51. Other circuits have apparently applied *Monell*'s official-policy requirement regardless of the relief sought. *See, e.g., Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001).

The District invoked *Monell* as a defense in this case, disputing liability for Truth's injuries on the grounds that "[n]o District policy is implicated in this case." Cross-Petition, p. 10. On appeal, the Ninth Circuit rejected the argument out of hand, citing *Chaloux* as binding precedent and finding *Monell* inapplicable, because Truth seeks prospective relief. App. 19a-20a.

But the Ninth Circuit could have just as easily dismissed the District's argument because an official

policy triggers Truth's § 1983 action. In fact, the District has effectively conceded its *Monell* defense in repeatedly pointing to the nondiscrimination policy as the singular basis for denying Truth's charter applications – contradicting its bald and curious assertion that "no District policy is implicated here." The Ninth Circuit highlighted the District's reliance on the nondiscrimination policy throughout its opinion:

- "The District has argued that [its] non-discrimination policies require it to deny ASB recognition to Truth." App. 11a.

- "The District asserts that ... its own non-discrimination policies mandate that it deny ASB recognition to Truth. ... [So] we do not see how the District might approve the same or a similar charter request in the future." App. 15a.

- "Here, the harm [Truth is alleging] is traceable to the District's [non-discrimination] policies, which the District has argued compel it to deny ASB recognition to Truth." App. 16a.

- "Relying on its non-discrimination policies, the District points to three aspects of Truth's charter that justify its decision to deny the club ASB recognition." App. 20a.

In following precedent of another panel, the Ninth Circuit was obliged to acknowledge *Chaloux*, but a cursory view of the record reveals the existence of an official policy. For this reason, the cross-petition is not particularly well-suited to resolve any

circuit split about the interpretation of this Court's holding in *Monell*. In order to reach the constitutional issues in Truth's petition, this Court need only recognize that *Monell*'s official-policy requirement has been met through the presence of the District's nondiscrimination policy and move on to the constitutional issues at stake.

CONCLUSION

While circuit courts do seem to quibble over the applicability of *Monell*'s official-policy requirement to claims for prospective relief, this issue has no bearing on Truth's § 1983 claim (or petition for writ of certiorari). The District relies on its nondiscrimination policy as the reason for excluding Truth from the forum, and the existence of this official policy eliminates the need for this Court to consider the *Monell* issue. The cross-petition ought to be denied.

Respectfully Submitted,

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This petition concerns the fundamental right of a religious student group to maintain its religious identity through its membership. The District nondiscrimination policy forces Truth to accept anyone as a member, even those whose views or conduct are inimical to the club's core ideology, while allowing secular clubs unquestioned freedom to form membership according to group values. The Ninth Circuit found no fault with this policy. And, if allowed to stand, this decision will deprive Truth – and countless other religious student groups – of fundamental associational freedoms crafted in the Equal Access Act and birthed in the First Amendment.

I. THE ISSUES BEFORE THIS COURT ARE FULLY DEVELOPED AND WILL NOT BE AFFECTED BY THE NARROW, UNRELATED ISSUE ON REMAND.

The District asks this Court to decline review on the important statutory and constitutional issues raised in Truth's petition, loosely claiming that such would give this Court "the benefit of the additional factual development on remand." Resp., 16. In reality, the issues raised in the petition are fully developed and the remand pertains to a narrow, unrelated question. The Ninth Circuit aptly describes this as a "limited" question that is "different in kind" than the issues before this Court. App. 28a. It is focused entirely on how the District applied its policy to a couple of other clubs in respect

to sex – a discrete factual matter – and the present issues deal with the impact of the policy on Truth.

The district court and Ninth Circuit will not reconsider any of the issues presented in this petition, and thus, the proper time for this Court to review is now.

II. THE NINTH CIRCUIT'S EQUAL ACCESS ACT ANALYSIS WARRANTS THIS COURT'S REVIEW.

One of the most remarkable aspects of the Ninth Circuit's decision is its refusal to interpret the Equal Access Act to protect students' expressive associations. This effectively puts nondiscrimination policies – and their adverse impact on associational rights – beyond the reach of the Act, and in direct conflict with the Second Circuit's holding in *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996).

Like the Ninth Circuit, the District tries to marginalize Truth's membership requirements as mere "acts." Resp., 18-19. But the labeling cannot negate the expressive aspect of membership. Invariably, membership is expression because "personnel *is* policy." App. 153a (Bea, J. dissenting) (citation omitted). This certainly holds true for Truth. Truth specifically observes in its charter that "[t]he character, behavior, speech and conduct of every person participating in the club reflects upon the religious expression and association of the club." App. 178a. For this precise reason, Truth requires every member to "comply[] in good faith and

Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible." App. 7a, 178a. The qualification for membership is tied directly to the expression the group wants to share both internally and externally.

The District -- echoing the Ninth Circuit -- claims that *Hsu* is distinguishable because the club in that case sought to impose a religious test for its leadership positions, while Truth imposes such a test for all its members. Resp., 9-10; App. 27a-28a (distinguishing *Hsu* solely on this basis). But the District, like the Ninth Circuit, places major emphasis on a minor difference. The leadership criteria upheld in *Hsu* would necessarily be struck down under the legal analysis set out in *Truth*. By viewing nondiscrimination policies as merely regulating conduct, the Ninth Circuit does not believe that the Act's protections contemplate such policies at all, irrespective of their effect on expressive associations. App. 21a-28a.

Contrast that with the Second Circuit, which saw in the Act's plain language and legislative history "an implicit right of expressive association." *Hsu*, 85 F.3d at 859. As a result, the court grounded its analysis of the school district's nondiscrimination policy in the nexus between the group's purpose for existence and its exclusionary practice, leaning heavily on this Court's expressive association jurisprudence. *Id.* at 858-59. With the right nexus, the court explained, an exclusionary practice may foster a group's shared interest in communicating a particular viewpoint. *Id.* at 859. Such was the case

with the Christian club before the Second Circuit. The group's purpose was religious, and its religious test for certain officers was deemed "essential to the expressive content of the meetings and to the group's preservation of its purpose and identity, and [thus] protected by the Equal Access Act." *Id.* at 848.

Against this backdrop, the District carelessly proclaims that "the Second Circuit would reach the same conclusion with respect to the issue presented here." Resp., 9. As *Hsu* indicates, the Second Circuit would examine the group's religious purpose and basis for exclusion prior to reaching any conclusion about the matter. The Ninth Circuit, on the other hand, does not bother with consideration of any nexus between Truth's purpose and its exclusionary practice. Upon finding the District's nondiscrimination policies to be in existence, the court went no further. App. 64a.

Aside from hypothetical outcomes of particular cases, the District glosses over the larger and more significant point: the Second Circuit and Ninth Circuit differ deeply on whether the Equal Access Act covers expressive association freedoms. While different circumstances can dictate different results, the District cannot possibly harmonize *Hsu* with *Truth* with *Hsu* being more faithful to the meaning of the Act.[1] And this great divide between

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[1] As described in the Petition, the intention to protect expressive associations is undergirded by the legislative history of the Act. Pet., 18-19. The District denigrates Truth's recitation of legislative history as a "fragment," but tellingly, fails to supplement with any legislative backing of its own. Resp., 18.

Second and Ninth Circuits – regarding suitable interpretation and application of the Equal Access Act – requires this Court's immediate attention.

III. THE NINTH CIRCUIT'S EXPRESSIVE ASSOCIATION ANALYSIS WARRANTS THIS COURT'S REVIEW.

This Court's ruling in *Boy Scouts of America v. Dale* requires strict scrutiny of any state action that intrudes on a group's membership. 530 U.S. 640, 648 (2000). The Ninth Circuit eschewed this standard for Truth's expressive association claim, in favor of forum analysis. App. 68a.

In defending the nonconforming shift in legal analysis, the District theorizes that *Dale* and the balance of this Court's expressive association jurisprudence can be jettisoned on the grounds that this Court has yet to entertain expressive association in the context of a government forum, that is, after the advent of forum analysis. Resp., 21-23.[2] Since this Court has never mentioned venue as a factor in assessing expressive association claims, the departure from traditional doctrine is suspect. Even so, the fact that the Ninth Circuit has taken a divergent view on *Dale* – and employed a radically different approach for evaluating expressive association claims – only underscores the necessity for this Court's intervention.

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[2] The District also tries to distinguish *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), *Roberts v. U. S. Jaycees*, 468 U.S. 609 (1984), and *Healy v. James*, 408 U.S. 169 (1972) on this same basis.

The District also urges that the instruction of *Dale* be shunned - and forum analysis be embraced - because the restriction on Truth is not direct, but rather an indirect impact via access. Resp., 24-25. But this rationale is not supported by any precedent. Indeed, this Court has repeatedly affirmed that inappropriate interference with expressive association "may take many forms." *Dale*, 530 U.S. at 658; *Roberts*, 468 U.S. at 622. The right to expressive association is protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).[3]

The Ninth Circuit diverges from this Court's holdings chiefly on the stubborn insistence that expressive association is nothing more than speech

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[3] The District further protests in vain that applying strict scrutiny to an expressive association claim in a limited public forum "would undo decades of law establishing that strict scrutiny does not apply whenever government subsidizes some speech, but not all speech." Resp., 27-28 (quotation marks and citations omitted). The instant case is no more a subsidy case than *Healy*. But even if equal access could be depicted as a "subsidy," this Court has explained that its "unconstitutional conditions" doctrine prohibits the government from "plac[ing] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original). This condition is precisely what the District is imposing on Truth, as Truth is required to abandon its membership criteria and core identity beyond the realm of the forum itself.

and should be regulated as speech. App. 37a; Resp., 25. This view overlooks that the right of expressive association is linked to multiple constitutional protections besides the freedom of speech, in particular, the freedoms of assembly, petition, and religious exercise. *Roberts*, 468 U.S. at 622. Thus, it is not fitting to treat an intrusion on a group's expressive association the same as an intrusion on pure speech. These rights, while interrelated, are not coextensive. And the conflating of the two - as the Ninth Circuit has done - unduly weakens this fundamental liberty.

Healy recognized the critical importance of protecting associational rights, and did so in a government-controlled forum. There, similarly to here, a state university denied official recognition to a student club because it disagreed with the philosophy of the group. *Healy*, 408 U.S. at 175. And this Court found that the university could not satisfy its "heavy burden" to justify this intrusion into the club's associational rights. *Id.* at 184.

In an attempt to circumvent *Healy*, the Ninth Circuit implicitly, and the District explicitly, portray *Healy* as an obsolete precedent that has effectively been overshadowed by this Court's subsequent public forum cases. Resp., 23. Had *Healy* come later, the District asserts, this Court would have applied forum analysis instead.[4] This is wild speculation (at

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[4] The District claims that *Widmar v. Vincent*, 454 U.S. 263 (1981) "establishes" that *Healy* has been overruled, and forum analysis is proper for expressive association claims arising in government-controlled forums. Resp., 23. But *Widmar* never makes such a claim. Contrary to the District's contention, this

best) and cannot possibly validate the decision below. The Ninth Circuit was obliged to follow *Healy* up and until this Court expressly overrules it. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[5]

In contrast to the Ninth Circuit, the Seventh Circuit dutifully applied *Dale* and *Healy* in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), a student-club case much like this one. The District strains to evade the obvious conflict and reconcile the two opinions, plodding through a series of insubstantial aspects of *Walker* while largely mischaracterizing the import of the decision, but to no avail. None of the District's arguments diminish

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Court did not even employ forum analysis in the case. And even though the regulation in *Widmar* triggered both pure speech and associational concerns, the speech claim was emphasized because the restriction was limited to the forum. There, a public university made its facilities generally available to student clubs to use for meetings, but prohibited clubs from using the facilities "for purposes of religious worship or religious teaching." *Id.* at 265. Unlike the restrictions in this case, and in *Healy*, the *Widmar* restriction did not attach to clubs apart from the forum.

[5] The District also characterizes the facts in *Healy* as being "far more extreme" than this case. Resp., 24. But, in actuality, Truth is seeking the same access as the club in *Healy*.

the square contradiction on expressive association rights.[6]

The District's primary argument is that *Walker* can be distinguished because it involved CLS's criteria for voting members and officers. Resp., 11-12. This detail is more of a distraction than a meaningful distinction.

Contrary to the District's claim, the Seventh Circuit did not specify restriction on voting members or leaders as being relevant to the impairment on CLS in *Walker*. Instead, the appellate court placed significance on the "presence" of individual members holding views antithetical to the group's ideology. *Walker*, 453 F.3d at 861-62.[7] The *Walker* court explained that forcing CLS "to accept as *members* those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Id.* at 863 (emphasis added). It was not the act of voting or leading that caused these unwelcome members to alter the group's expressive association, but - as the

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[6] For example, the District's lead argument points to the Seventh Circuit finding it unlikely that the university policy applied to CLS, and says that the holding distinguishes *Walker* from the instant case (Resp., 11), but the presence of an additional ruling does not eradicate a conflict explicitly set out in the opinion.

[7] The Seventh Circuit was simply following the lead of this Court in *Dale*. *Walker*, 453 F.3d at 861-64. In this case concerning a non-voting member of the Boy Scouts, this Court stressed: "the presence of Dale as an assistant scoutmaster would ... surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Dale*, 530 U.S. at 640.

Seventh Circuit understood and articulated – it was their formal association with the club. This same concern applies to Truth and its intended message.

The District also claims that *Walker* is distinguishable from this case because it arose in the university setting. Resp., 13-14. This notion, though, was recently dispelled in *Christian Legal Society Chapter of the University of California v. Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009) ("*Kane*"). *See* Supplemental Brief in Support of Petition (expounding on how *Kane* demonstrates the broad ramifications of *Truth*). There, in a case involving a law school club, the Ninth Circuit confirmed that its analysis applies with equal force in the university setting.

Additionally, the District claims that *Walker* and the decision below are not in conflict because the courts evaluated the clubs' free speech claims in the same way. Resp., 12-13. And, with this, the District is mistaken again. Unlike the Ninth Circuit, *Walker* rightly analyzed CLS's expressive association claim apart from its free speech claim. 453 F.3d at 861-865.[8]

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[8] The District appears to suggest that the Seventh Circuit would have applied forum analysis to CLS's expressive association claim if not for its finding of viewpoint discrimination. Resp., 12. And yet, the Seventh Circuit did not mention the nature of the forum until it reached CLS's free speech claim – after it already concluded that the club was likely to succeed on its expressive association claim. *Walker*, 453 F.3d at 865.

The District further disputes any conflict between the decision below and *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000). In *Cuffley*, the Eighth Circuit considered expressive association and free speech challenges from the Ku Klux Klan after it was excluded from a state Adopt-A-Highway program. Taking a more traditional route than the Ninth Circuit here, the *Cuffley* court did not apply forum analysis to the expressive association claim, even though the issue concerned access to a limited public forum. 208 F.3d at 708-09.

The District misses the point in contending that the Eighth Circuit "did not have to consider the nature of the forum because it found that the defendant had engaged in viewpoint discrimination." Resp., 14. The court's viewpoint discrimination analysis had nothing to do with its expressive association analysis. Citing this Court's line of expressive association cases, the Eighth Circuit found the nondiscrimination policy violative of the Klan's "freedom of political association." *Id.* at 708.

In short, *Walker* is "on all four with our case," and in sidestepping *Dale* and *Healy*, the Ninth Circuit "clearly establishes a circuit conflict." App. 162a. The same is true for *Cuffley*. This conflict among the circuits warrants review.

CONCLUSION

For the foregoing reasons, this Court should grant Truth's Petition for Writ of Certiorari.

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No. 08-1268

IN THE

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KENT SCHOOL DISTRICT, *et al.*,
Cross-Petitioners,

v.

TRUTH, an unincorporated association, *et al.*,
Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR CROSS-PETITIONERS

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REPLY BRIEF FOR CROSS-PETITIONERS

Truth's opposition to the Kent School District's conditional cross-petition raises an entirely new argument that was not presented to either the Ninth Circuit or the District Court. Truth now attempts to mount a challenge to the District's non-discrimination policy on its face, alleging that the policy, as written, violates constitutional rights and rights under the Equal Access Act. However, all of the proceedings below concerned only the *application* of the District's non-discrimination policy, not a challenge to the policy on its face.

Indeed, an aspect of the as-applied challenge remains undecided in the portion of the case remanded

to the District Court. In the ongoing proceedings in the lower court, Truth is challenging the even-handedness of the District's application of its non-discrimination policy. Truth seeks to establish a bias against religion by contesting the District's apparent grant of "waivers" from the non-discrimination policy in the instances of the Girls' Honor Club and the Men's Honor Club. Pet.App. 66a-67a. In this effort, Truth clearly presents a classic as-applied challenge.

Truth's eleventh-hour argument notwithstanding, review of the Ninth Circuit's *Monell* ruling remains a threshold issue that this Court should consider if it were to review the constitutional and Equal Access Act issues raised by Truth's petition.

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